Articles + Publications | April 8, 2024

Locke Lord QuickStudy: Revisions to Endangered Species Act ?Regulations Reverse Some Trump, ?Keep Some Trump, Raise ?Opportunity for Mischief

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On April 5, 2024, The U.S. Fish & Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") finalized a series of rules reversing certain revisions to the Services' regulations made in 2019 (which we summarized in this QuickStudy). These rules reinstate the blanket 4(d) rule, modify the regulations relating to interagency consultation (while leaving in place some helpful changes from 2019), and clarify the process by which the Services make listing, delisting, and reclassification decisions and critical habitat designations. However, they also include some troubling language regarding Section 7 consultations and the Services' interpretation of recent court decisions that could have troubling consequences for the regulated community.

Not surprisingly, the rule revisions received considerable attention – the Services stated that they received approximately 468,000 public comments across the three rules during the public comment period. The final rules are effective May 6, 2024. The following is an overview of the key changes contained in the new rules.

Rolling it back

On January 20, 2021, President Biden issued Executive Order 13990 ("EO"), which required all agencies to review agency actions issued between January 20, 2017, and January 20, 2021, to determine consistency with the national objectives set forth in that EO. A Fact Sheet accompanied the EO, in which the President provided a "non-exclusive list" of actions to be reviewed. The list included the Services' 2019 revisions to their joint regulations implementing the Endangered Species Act ("ESA").

In response to the EO, the Services undertook a series of rulemakings to revise the rules identified in the Fact Sheet. In addition, the USFWS reviewed its recission of the 4(d) blanket rule.

What's in the box?

4(d) blanket rule

Section 9 of the ESA prohibits the "take" only of those species listed as endangered; the prohibition does not

extend to species listed as threatened. However, Section 4(d) of the ESA states that the Service may, through regulation, extend some or all of the Section 9 take prohibitions to threatened species.

Prior to the 2019 revisions, the USFWS automatically extended the Section 9 take prohibition to all threatened species unless the Service promulgated a species-specific 4(d) rule limiting its application. This was known as the "blanket 4(d) rule," and its application was limited to species subject to USFWS jurisdiction – that is, species other than marine and anadromous (sea-run) species. The 2019 revisions rescinded the USFWS's blanket 4(d) rule.

The 2019 revisions to the 4(d) rule were the subject of litigation in the Northern District of California, which vacated the rule. Subsequently, the Ninth Circuit temporarily stayed the effect of that decision pending resolution of certain motions. The Services informed the district court that they planned to revise the 2019 revisions, at which point the district court remanded the rule to the USFWS without vacating it in anticipation of the present rulemaking.

While the revised regulation applies prospectively, the changes to the regulation will also affect currently-listed threatened species to the extent that a species was either previously protected under (i) any species-specific 4(d) rule that refers to 50 CFR 17.31(b) or 17.71(b), and (ii) any threatened species protected with the previous "blanket rules."

Listing/delisting species and designating critical habitat

The Services also revised their joint regulations regarding listing and reclassification of species and designation of critical habitat. The rule reinstates prior language affirming that listing determinations are made "without reference to possible economic or other impacts of such determination." The Services also made minor changes to clarify certain provisions added in 2019 with respect to the listing and delisting of species, including reframing the foreseeability of risks for the purposes of listing a species as threatened, revising the set of circumstances for when critical habitat may be not prudent, and revising the criteria for identifying unoccupied critical habitat.

Economic and other impacts

Section 4(b)(1)(A) of the ESA requires the Services to determine whether to list a species as threatened or endangered "solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species." Before the 2019 revisions, the Services' regulations stated that these listing decisions were to be made "without reference to possible economic or other impacts of such determination." The 2019 revisions removed that phrase. In the preamble to the revisions, the Services stated that all listing determinations would be based solely on biological considerations, but that under certain circumstances, referencing economic or other impacts would be "informative to the public." This caused concern in the conservation community that including that information in listing discussions would influence public and political support for listing decisions.

The new rules reinstate the prohibition against inclusion of "possible economic or other impacts" when determining whether to list a species as threatened or endangered.

Listing and delisting species

When deciding whether to list a species as threatened, the Services are required to "analyze whether the species

is likely to become an endangered species within the foreseeable future." The Services made minor changes to the definition of foreseeable future to clarify that the foreseeable future extends as far into the future as the Services can make "reasonably reliable predictions" about the threats to a species and its responses to threats. This change merely removes confusion about the wording introduced in the 2019 revision, which was intended to limit the extent of the "foreseeable future."

The 2019 revision, in streamlining the rule, removed certain contextual information about the factors considered in a delisting decision. While the rule reintroduces some of that previously-removed context, it retains the 2019 revision which required that a Service's delisting decision be based on the same factors as a listing decision.

Critical habitat designation

Federal actions impacting critical habitat trigger consultation under Section 7 of the ESA. During consultations, the Services must determine whether a proposed federal action will result in the destruction or adverse modification of designated critical habitat. However, critical habitat is not designated for every listed species. Under certain circumstances, the Services may determine that the designation of critical habitat is not prudent.

The new rule removes language added by the 2019 revisions that allowed the Services to make a "not prudent" determination where "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations" under Section 7. Removal of this language allows the Service broader discretion to consider external factors such as climate change when determining whether the designation of critical habitat is prudent. The Services appear to intend to expand the scope of critical habitat designation, which may result in more projects triggering Section 7 consultation requirements. The regulation has minimal immediate effect as it applies only prospectively to new listings. It remains to be seen whether this broader discretion will materially change the amount of critical habitat actually designated for future listings.

The designation of critical habitat that is not occupied by listed species has been the subject of litigation and controversy for many years. Before 2016, designation of unoccupied critical habitat could only occur if the occupied critical habitat was "inadequate to ensure the conservation of the species." This requirement was eliminated in 2016 and reinstated in 2019. The 2019 revision required a two-step inquiry, allowing unoccupied critical habitat designation only upon a determination that 1) occupied habitat was inadequate, and 2) the unoccupied habitat contained one or more physical or biological features "essential to the conservation of the species." The Services' new rule no longer requires exhaustion of occupied critical habitat before designating unoccupied critical habitat, but retains the requirement that the Service determine that the area is essential for the conservation of the species.

Interagency consultation

The new rule also revises interagency consultation procedures under Section 7 of the ESA. Section 7 requires agencies undertaking federal actions that may adversely affect a listed species or designated critical habitat to engage in a formal consultation process with the USFWS or NMFS. This process requires the Services to evaluate whether the proposed federal action is likely to jeopardize the continued existence of the listed species or result in the destruction or adverse modification of critical habitat, also known as a "jeopardy finding." If the consultation results in a jeopardy finding, the Service may impose reasonable and prudent measures ("RPMs") which an

applicant must undertake to minimize the impacts to the affected species.

In 2019, the Services revised their regulations to codify the use of programmatic consultations; establish a 60-day deadline to complete informal consultations; revise the definition of "destruction or adverse modification" to require diminishment of the value of the critical habitat "as a whole;" and to revise certain other definitions. The new rule does not represent a wholesale return to the status quo prior to 2019. The Services stated that "[w]ith the exception of the revisions at 50 CFR 402.02 and 402.14 regarding the RPMs in an incidental take statement (ITS), the revisions do not make any changes to existing practice of the Services in implementing section 7(a)(2) of the Act." Indeed, the rule retains some of the more helpful changes from the 2019 rulemaking, including programmatic consultations and the 60-day deadline for completion of informal consultations.

Notably, one helpful change from the 2019 rule that the new rule does roll back is the requirement in 50 CFR 402.17 that "[a] conclusion [that an effect be] reasonably certain to occur must be based on clear and substantial information." Several commenters pointed out that there was some tension between this repeal and the recent D.C. Circuit decision in *Maine Lobstermen's Association v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023) ("*MLA*"), which held that the Services may not respond to scientific uncertainty by "giv[ing] the 'benefit of the doubt' to an endangered species by relying upon worst-case scenarios or pessimistic assumptions," and must instead rely on an "empirical judgment" about what effects are "likely." Despite the clarity with which the D.C. Circuit spoke in its opinion in *MLA*, the Services have largely acted as if the decision never happened. Clearly sensing the need to explain this approach, the Services took the unusual step of responding to these comments in the preamble to the new rule, essentially stating that *MLA* has not altered how they conduct their consultations and asserting that the "clear and substantial information" requirement is inappropriate because even the best available science isn't always clear. This circular argument strongly telegraphs that the Services will not be deviating from their penchant for relying on speculative and unclear science in their consultations (notwithstanding the fact that the D.C. Circuit directed them to do just that).

Importantly, the rule expands the scope of reasonable and prudent measures, which are actions that the USFWS or NMFS "considers necessary or appropriate to minimize the impact of the incidental take on the species." The rule revises § 402.14 to state that reasonable and prudent measures are not limited to incidental take reduction, and may include actions intended to "avoid, reduce, or offset the impact of incidental take." The Services base this aggressive embrace of compensatory mitigation on a broad interpretation of Section 7's requirement to "minimize" the impact of incidental take to include actions to "counterbalance the loss of individuals" through mitigation. Notably, the Services take the position that such measures may occur either inside or outside of the area of the federal action.

This amendment represents a major expansion of the universe of reasonable and prudent measures that may be imposed on applicants where the Section 7 consultation results in a no jeopardy finding. (Previously, such compensatory mitigation was limited to reasonable and prudent *alternatives* that accompany a jeopardy finding.) Viewed optimistically, this revision could open the door to a more flexible approach to mitigation in which the Services could substitute offsetting measures where there is no economically or technically feasible way to modify a project to reduce take to the Services' preferred level. But given the lack of guardrails on the amount and type of offsetting mitigation (other than a general requirement that it be "proportional to the impact of the incidental take"), perhaps a more likely scenario is that this mechanism is used as a cudgel to extract major expenditures from project proponents. It seems possible (perhaps probable) that this aspect of the rule will spawn litigation in the

form of facial and as-applied challenges.

What does it mean?

The focus of this rulemaking exercise was clearly aimed at regaining lost ground before the elections later this year, and it is encouraging that the rules retain some of the more helpful provisions added during 2019. As with the “flip” of 2019, the “flop” of 2024 will likely result in very little change for the development and expansion of energy and infrastructure projects, with the potential exception of Section 7 consultations. If the Services use the expanded definition of RPMs to impose compensatory mitigation requirements even when making no jeopardy determinations, instead of as a means of expanding no jeopardy determinations, then the effect could be troubling. Also troubling is the Services’ overly narrow interpretation of the *MLA* decision announced in the preamble, which appears to rob the regulated community of an important judicial victory that should have served as a constraint on agency overreach. Those concerns aside, as with the 2019 revisions before them, these regulations likely will have little impact on onshore renewable energy development, as they do not address the ESA’s Section 10 incidental take permitting process, which is the mechanism most commonly used to authorize take from onshore projects.

Please contact the authors for any questions regarding these new rules or how their implementation may affect your business.

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